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IN THE

Supreme Court of the United States

No. 620

G. O. PAUDLER, *Petitioner*

v.

LYDA M. PAUDLER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it Please the Court:

Petitioner, G. O. Paudler, respectfully requests the United States Supreme Court to issue writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 21, 1950.

OPINIONS BELOW

There was no opinion written or filed by the District Court, so far as Petitioner knows, but the opinion of the Court of Appeals (R. 174-178), is reported in 185 Fed. (2) 901.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1950 (R. 179). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

FIRST QUESTION PRESENTED

Jurisdiction Federal Court—Diversity of Citizenship —Wife's Abandonment Matrimonial Domicile—Citizenship Clause Federal Constitution:

First question presented is one of Federal Court jurisdiction, dependent upon diversity of citizenship, to-wit, domicile of Respondent, in the present suit filed by her as a citizen of Arkansas against Petitioner as a citizen of Texas, for partition of property accumulated by them while husband and wife (R. 2-8), wherein the Respondent admits (in a contest of her legal right to choose a domicile different from that of her husband in the State of their matrimonial domicile) she abandoned her husband and home (R. 145), in Texas, (where they were married and always resided) to live in Arkansas in the same apartment with another married man (R. 90, 11)

"charged with illicit cohabitation" (R. top p. 145), and obtained an Arkansas divorce without personal notice (R. 160) upon constructive service "by publication" only (R. 160), and wherein there was other evidence, abundant if not conclusive, to sustain the judgment of the trial court dismissing Respondent's suit for want of jurisdiction, the legal question herein presented being more particularly whether (under Art. 14, sec. 1, of the Federal Constitution, declaring all persons born in the United States are *citizens* of the "state wherein they *reside*"), such provision required the Court of Appeals to hold, as it did hold, erroneously Petitioner asserts, that "*it is well established that plaintiff was at liberty to instantly transfer her citizenship from Texas to Arkansas * * * without necessity and from choice * * * for any reason that seemed sufficient to her.*"

SECOND QUESTION PRESENTED

Jurisdiction Foreign Court—Divorce Decree, Constructive Service—Evidence of Residence—Full Faith and Credit Clause, Federal Constitution:

The second question involves the legal right of Petitioner to question the jurisdiction of a foreign court decree, rendered by an Arkansas Court, without personal notice, upon constructive service "by publication" only, (R. 160), and upheld by the Court of Appeals in the present suit, filed by Respondent as a citizen of Arkansas against Petitioner as a citizen of Texas, for partition of property

accumulated by them while husband and wife (R. 2-8), wherein Petitioner attacked the Arkansas decree on the ground the Respondent never became a citizen of that state (R. 8-22) and wherein Respondent admitted she abandoned her husband and their home in Texas (R. 145) where they were citizens and had their matrimonial domicile (R. 79, 174-5) to live in Arkansas in the same apartment with another married man (R. 90, 111) charged with "illicit cohabitation" (R. top p. 145), and obtained such Arkansas divorce (R. 160), without personal notice, upon constructive service "by publication" only (R. 160), there being abundant if not conclusive evidence showing Petitioner never had the bona fide intention of permanently removing to the State of Arkansas, the Petitioner here asserting that the Court of Appeals erred in holding in this case that, under the Full Faith and Credit Clause, Art. 4, sec. 1, of the Federal Constitution, the trial court made a "mistake" in dismissing the Respondent's suit, on the ground that the Arkansas Court "*necessarily found that plaintiff was a bona fide resident of Arkansas*" and "*this finding should be accorded full respect.*"

THIRD QUESTION PRESENTED

Inherent Power Federal District Court to Determine Jurisdiction, Where Intention to Change Residence an Issue.

The third question presented is whether (in a suit of this kind, where Federal Court jurisdiction is dependent

upon diversity of citizenship, and the trial court's order granting Defendant's motion to dismiss for want of jurisdiction is sustained by evidence showing that Respondent never removed to the State of Arkansas with the "intention" of becoming a citizen of that state, and Respondent admitted she left her husband and home in Texas, in which they had their matrimonial domicile, R. 71, 174-5, to live in Arkansas in the same apartment with another married man, R. 90, 111, "charged with illicit cohabitation", R. 145), the Court of Appeals, in reversing the judgment of the trial court, committed an error in deciding a jurisdictional fact contrary to the evidence which inherently the trial court had the right to weigh and finally determine, where the issue of lack of intention was abundantly supported by the evidence.

STATEMENT

Petitioner sued Respondent, according to Respondent's Bill of Complaint, (R. 2-8) filed in the Federal District Court of Texas (R. 2-8), against Petitioner, for partition of property accumulated by them while husband and wife in Texas (R. 2-8), where they were citizens and had their matrimonial domicile, from the time of their marriage in 1921 to 1948 (R. 174-5), when Respondent left for the State of Arkansas (R. 174-5) where she undertook to acquire decree of divorce (R. 160).

In due time, Petitioner filed motion to dismiss (R. 8-23). In said motion to dismiss, Petitioner includes two claims as to the law, as follows:

First Respondent did not, and could not legally, under the facts, by abandoning the matrimonial domicile of herself and husband in Texas, acquire a separate domicile for herself in Arkansas, absent (a) necessity for protection against her husband, etc., (b) residence in the new domicile, and (c) intention to remain there permanently, to be determined by her course of conduct.

At any rate, Petitioner denies that, as held by the Court of Appeals in this case (R. 174-8), there is any "*well established*" law which (in the absence of fear, protection, etc.,) granted to Respondent the "liberty", unqualifiedly and unconditionally, to "*transfer her citizenship from Texas to Arkansas * * * without necessity and simply from choice * * * for any reason that seemed sufficient to her*", as held by the Federal Court of Appeals in this case (R. 174-8). Certainly the Fourteenth Amendment to the Federal Constitution did not confer such right.

Second. Respondent having abandoned her husband and home in Texas, in which they had their matrimonial domicile at the time of such abandonment, to go to Arkansas, where she obtained divorce decree, without personal notice, *upon constructive service only*, Petitioner contends that, even if such judgment necessarily found that Respondent was a bona fide resident of Arkansas, such

finding is not entitled to "full respect", under the Full Faith and Credit Clause, or any other law, and does not preclude the Petitioner, in the State of their matrimonial domicile, from attacking such finding to show lack of jurisdiction, because neither of the parties to the Arkansas divorce decree was a citizen of such state.

The trial court in this case, after hearing the evidence pro and con, briefly summarized herein, sustained said motion and dismissed Respondent's suit for partition (R. 163). Upon appeal by Respondent the Court of Appeals reversed the trial court (R. 179).

To prove to this Court that the Court of Appeals in this case decided, and intended to decide, the aforesaid important questions of Federal law and procedure, according to the above stated *LAW*, and not in accordance with the issues of *FACT* upon which the trial court based its ruling, the following brief summary of such facts is submitted:

The undisputed evidence shows that the Respondent, a married woman, with the matrimonial domicile of herself and husband in the State of Texas, in which they were citizens, rode away one day with another married man, both leaving home, family, and much property in said state (R. 145), the Respondent writing back to her daughter, "*I know you should hate your mother for doing such a thing*" (R. 43) but that she is only "leaving for a *while*" (R. 42), thereby showing that her escapade was intended as a temporary absence only. *Respondent does not and*

cannot quote a single word spoken or specify a single act done, by Petitioner, to cause her to be afraid of her husband.

Respondent admits that she thereafter lived in the same apartment in Harrison, Arkansas (R. 111), where she did the cooking and acted as housekeeper for this married man companion (R. 144), "charged with illicit cohabitation" (R. top p. 145), but swears that her immediate meeting with this married man upon arrival in said state, whither both claim they had gone for "*stomach trouble*" (R. 83, 144), was "*purely an accident*" (R. near top p. 111), (which queer testimony caused the Chanceller of the *Boone* County, Arkansas, court, in which she was unsuccessful in obtaining divorce, to remark, R. 145, he had never heard of the climate there being beneficial for stomach trouble).

The undisputed evidence shows Respondent then shifted to *Pulaski* County, Arkansas, where she finally obtained divorce from her husband domiciled and residing in Texas, *upon constructive service by publication only* (R. 160), all of which uncontroverted evidence is inconsistent with the Respondent's contention she left her husband because of fear of husband or intention to change her matrimonial domicile from Texas to Arkansas, especially when, upon the trial of the issue of domicile in the court below, Respondent was asked by her counsel the direct question whether it was her "intention" to make Arkansas her "*home*" for the "*rest of her life*" (R. bot. p. 83), she

answered evasively she had "stomach trouble" and "felt better" and intended "to live there" (R. bot. p. 83), and then and there dodged the real issue of whether she had "the intention to remain there permanently or indefinitely". She never did say whether she intended to live there after she regained her health, and certainly never did deny her intention to return to Texas after getting a divorce and property division, even though she afterwards gave an affirmative answer to her lawyer's question pressed upon her as to whether it was her intention to live permanently in Arkansas, which affirmative answer as to intention was a self-serving declaration not binding upon the Court.

The trial court in this case (after exercising the prerogative of a trial court in passing upon the credibility of the Respondent, who was seen by him and not by the appellate court, and of the weight to be given her testimony, especially when the unsupported testimony of such Respondent is discredited, inconsistent, and contradictory, as shown), dismissed the Respondent's Federal Court suit for lack of diversity of citizenship, and found that, under the facts showing the Respondent's "course of conduct" and the inferences to be drawn from the circumstances, the Respondent in this suit was not a citizen of the State of Arkansas when such suit was filed.

REASONS FOR GRANTING WRIT

As pointed out, under first paragraph, entitled "Statement", *ante*, the Court of Appeals, not only has decided the *FACTS*, contrary to the facts, and the "accepted and usual course of judicial proceedings", but, regardless, of facts, has erroneously decided the *LAW* as follows:

(1) That the LAW is "well established" that a married woman is "at liberty" to abandon the husband and home, in the state where they are citizens and have their matrimonial domicile, and acquire a separate domicile from that of the husband, "*without necessity and simply from choice * * * for any reason that seems sufficient to her.*"

Which decision of the law means, of course, that it is "well established" that *without "necessity"*, and *without "reason"*, the wife is *"at liberty"* to transfer citizenship (as if it were a mere chattel), and, under the 14th Amendment to the Federal Constitution, thereby become a "citizen" in another state, if she chooses to *"reside"* there.

(2) That it is the LAW that such married woman is also "at liberty", under any circumstances, to slip into a foreign county for the sole purpose of obtaining divorce, without personal notice, and upon constructive service "by publication" only, and that the finding of residence by the Court in such foreign county shall receive "full credit" by the Court in the state of their matrimonal domicile.

Which decision of the law means that thereafter the Court in the state of their matrimonial domicile is precluded from attacking such judgment because of lack of jurisdiction over the parties.

Obviously, such erroneous decisions of the Federal law and practice, as announced, are of such tremendous importance to the Federal judiciary, as require supervision and correction by this Court, particularly upon at least two legal questions of major significance, to-wit, (1) jurisdiction of Federal Courts, where dependent on diversity of citizenship, and (2) validity of "quickie" divorce decrees rendered by a court of foreign jurisdiction in favor of a migratory spouse upon constructive service only.

CONCLUSION

Petitioner prays that writ of certiorari be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 620

G. O. PAUDLER
Petitioner and Appellee below

vs.

LYDA M. PAUDLER,
Respondent and Appellant below

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Respondent, Lyda M. Paudler, respectfully presents:

SUMMARY STATEMENT OF MATTER INVOLVED

Respondent deems it necessary to submit the following Statement to correct inaccuracies and ommissions of Petitioner's Statement:

Nature of Suit and Results Below

On July 28, 1949, Respondent Lyda M. Paudler as a citizen of the State of Arkansas filed in the District Court for the Northern District of Texas, Lubbock Division, her complaint against her former husband, G. O. Paudler, Petitioner herein, and other defendants,

all residents of the State of Texas; sufficient jurisdictional allegations were made, Respondent alleging that she was a resident of Arkansas and that the amount in controversy exceeded the sum of Three Thousand Dollars ($3,000.00). (R. 1-3.)

Respondent alleged that she and Petitioner were owners and tenants in common of particularly described real and personal property; that Respondent and Petitioner were formerly wife and husband but were divorced; that no property settlement between them had ever been made, and that after Respondent and Petitioner had permanently separated and had been divorced, Petitioner executed certain particularly described fraudulent conveyances of real estate and personal property to the other defendants, in fraud of Respondent and her property rights. She alleged that she owned as her separate estate a total of 556 acres of land situated in Crosby County, Texas, and further alleged that Petitioner had failed and refused to account to her for the joint property and the rents and revenues therefrom and the rents and revenues from her separate property. She prayed for cancellation of the described fraudulent conveyances, partition and distribution of the property, and for an accounting by Petitioner. (R. 3-9.)

On August 22, 1949, Petitioner and his co-defendants in the trial court filed their Motion to Dismiss Complaint, asserting: (1) that Respondent was not then and had never been a bona fide citizen of the State of Arkansas, (R. 9); (2) that Respondent was the lawful wife of Petitioner and that no legal decree

of divorce dissolving their marriage had ever been rendered. (R. 9.) (In this connection Petitioner alleged that the decree of divorce rendered by the Chancery Court of Pulaski County, Arkansas, in Cause No. 85490, styled Lyda M. Paudler vs. G. O. Paudler was void for that court's lack of jurisdiction over the person of Respondent because at the time of the rendition of the decree, Respondent was not a bona fide resident of Arkansas) (R. 9); (3) that Respondent and others conspired to fraudulently pretend to change the 'matrimonial' domicile of Respondent from Texas to Arkansas for the unlawful purpose of illegally securing a divorce in Arkansas. (Following this allegation Petitioner and his co-defendants alleged certain so-called 'overt acts' committed by respondent "in order to effect such plan and scheme") (R. 9-16); and, in the alternative, (4) that Respondent schemed and planned to pretend to change her 'matrimonial' domicile for the unlawful purpose of illegally securing a divorce in Arkansas by fraudulently presenting in such State the status of a bona fide resident therein — with the further plan of fraudulently invoking the jurisdiction of the trial court below in her suit against the defendants there. (R. 16-17.) In connection with the allegations immediately above referred to, Petitioner and his co-defendants repeated the so-called 'overt acts' alleged to have been committed by Respondent in order to fraudulently invoke the jurisdiction of the trial court. (R. 17-22.)

Certain facts were requested to be admitted by Respondent, and she duly made answer to such requests, admitting, denying and answering such re-

quests, the greater part of which pertained to certain correspondence shown in the record as Exhibits. (R. 42-78, offered R. 113-117.)

Following a trial to the Court without a jury on September 30, 1949, the trial court on December 31, 1949, entered his Order of Dismissal, reciting one ground of the Motion ("this court does not have jurisdiction for the reason that the plaintiff, Lyda M. Paudler, was not a bona fide citizen of the State of Arkansas at the time this cause was filed") and found that "the plaintiff, Lyda M. Paudler was not a resident of the State of Arkansas at the time this suit was filed, and that therefore such motion should be sustained for the reason that the jurisdictional requisite of diverse citizenship did not exist." (R. 163-164.)

Respondent duly perfected her appeal from such Order to the Honorable United States Court of Appeals for the Fifth Circuit, the cause in that court being numbered 13,299, and styled Lyda M. Paudler, appellant, vs. G. O. Paudler, et al., appellees. On December 21, 1950, and after a "review of the entire evidence," that Honorable Court reversed the judgment of the trial court, feeling that a "mistake has been made," and held that in that court's opinion "new citizenship was truly and actually acquired" by Respondent in the State of Arkansas. (R. 173-178), *Paudler vs. Paudler*, 5 Cir., 1950, 185 F. (2) 901.

Facts:

Lyda M. Paudler, Respondent and plaintiff in the trial court, lived in Crosby County, Texas, with her

husband, Petitioner G. O. Paudler, for about twenty-seven years prior to September, 1948. (R. 79.)

On or about September 14, 1948, Respondent cashed a check for Three Hundred ($300.00) Dollars, drawn on the account of petitioner, G. O. Paudler (a community bank account, R. 86), and used such money to travel from Crosbyton, Texas, to the state of Arkansas. (R. 85.) She traveled from Crosbyton, Texas, to Dickens, Texas, with one Frank M. Brixey, in his automobile, and carried with her certain wearing apparel. (R. 80, 88.) At Dickens, Texas, she mailed a postal card to her daughter, Aurelia Fay Hash (a defendant in the trial court), and from Dickens, Texas, she took a bus to Dallas, Texas, where she spent a night with her brother. (R. 80.) From Dallas, Texas, she went to Texarkana, Texas, to see another of her brothers, who was not at home. (R. 80.) She then traveled by bus to Harrison, Arkansas. (R. 80.) She lived in Harrison, Arkansas, from the latter part of September, 1948, until the middle of April, 1949, in an apartment house in Harrison, keeping house. (R. 80.) In April, 1949, Respondent went to Little Rock, Arkansas, and took a job as a practical nurse for one Mrs. John Alexander, where she earned Twenty Dollars ($20.00) per week and her room and board. (R. 81.) Respondent returned to Texas twice after leaving in September, 1948, to be with her father who was ill. (R. 82, 83.) It was her intention when she left Texas to make her home in Arkansas; she intended to live there; she had the intention of living there when she left Texas, and she made Arkansas her home, testifying that she intended to return there after the trial

of this cause. (R. 83, 86, 98, 150.) After having lived in Arkansas for more than seven months, from September, 1948, to April, 1949, Respondent filed her complaint in the Chancery Court of Pulaski County, Arkansas, against Petitioner, for a divorce. (R. 154.) On June 1, 1949, the court rendered its decree of divorce dissolving the bonds of matrimony between Respondent and Petitioner. (R. 160-161.) Almost two months later, while still living in Arkansas, Respondent filed her suit in the trial court below. (R. 2.) On September 30, 1949, the date of the hearing on the motion to dismiss, she had undisputedly been living in Arkansas more than a year. She also testified that she intended to return to Arkansas after the hearing of the cause (R. 83, 86, 151), and she continues to make her home in Arkansas even to this good day.

Respondent bought no property in Arkansas because she had no money and had nothing with which to buy property (R. 85, 152) (it not being disputed that since leaving her husband he had withheld from her not only her share of the community property and revenue, but also her separate property consisting of more than 650 acres of land and all revenues therefrom) and she did not vote there, having arrived too late to pay her poll tax (R. 152); she paid no taxes, having no property assessible in Arkansas (R. 152), and she did not move her church membership, although she attended church regularly. (R. 152.)

In the trial court Respondent introduced a duly authenticated copy of the divorce proceedings in Arkansas, which was admitted in evidence. (R. 153, offered R. 84.) Respondent has now made her home in Ar-

kansas for a period of approximately two and one-half years, from September, 1948, to the present time.

The petition for Writ of Certiorari in this case is couched in misleading language, and possibly creates an impression which would be prejudicial to the Respondent. Therefore the Court's attention is called to the language "wherein respondent admits," or words of similar import (Petition for Writ of Certiorari, 2, 4, 5), which cunningly depict Respondent as having groundlessly "abandoned" her former husband under unbecoming circumstances. The fact of the case reveal that Respondent justifiably escaped from her husband, rather than that she abandoned him, and the term "left" her husband would be a more suitable reference throughout. Respondent did not abandon nor admit that she abandoned petitioner, as is stated in the Petition for Writ of Certiorari.

Further, Respondent takes exception to the use of the term "illicit cohabitation" or "charged with illicit cohabitation," as used in the Petition for Writ of Certiorari, pages 3, 4, 5, 8. This is because in the first place there was not even any "charge" shown in the record as to Respondent. In the Second place, there was no showing of a conviction of such offense as to Mr. Frank Brixey, (R. 145), and thirdly, we submit that a "charge" of an offense is certainly not evidence, particularly as against Respondent when she was not charged.

The practice of using garbled or distorted quotations from the record is, we think, one that should not be approved. Using the method of the Petitioner, we

could prove by the Bible that Satan is God. To illustrate, in Verse 10 of the 4th Chapter of the Gospel of Matthew is is recorded,

> "Then saith Jesus unto him, 'Get thee hence *SATAN* for it *IS* written thou shalt worship the Lord thy *GOD* and Him only shalt thou serve' "

Using Petitioner's method and by lifting out of their context the underscored and italicized words, we could prove by the Scriptures that Satan is God.

It is believed that should the court review the record, these matters will assume their proper places, and will not result in prejudice to the Respondent; but we further believe that the record should be allowed to speak for itself, without distortion.

QUESTION INVOLVED IN THE CASE

There is but one single question involved in this case, and a Writ of Certiorari could be granted only to review the evidence in the case to determine whether the trial court's finding of lack of domicil on the part of Respondent in Arkansas is "clearly erroneous." There is and can be but the one single question: Was Respondent domiciled in Arkansas on July 28, 1949? This is the only question passed upon in the courts below.

Petitioner's contentions to the contrary notwithstanding, the sole question is whether the trial court's finding of fact as to Respondent's domicile in Arkansas was properly set aside by the Court of Appeals, because not supported by the evidence. There are no questions

of law, vel non, in the case; none were decided in the lower courts.

There is no reason to grant a writ of certiorari in this case, the case involving only the Respondent and Petitioner and not the general public; there are no "special and important reasons" for the granting of a review on writ of certiorari. (U.S. Supreme Court, *Rule* 38 (5), 28 U.S.C.A.)

OBJECTION TO SUPREME COURT'S JURISDICTION

The petition for Writ of Certiorari does not comply with the rules of the Supreme Court. This Court has no jurisdiction of this case under 28 U.S.C., Sec. 1251 (4) (Petition for writ of certiorari 2), which concerns original jurisdiction of the court, and therefore there is no compliance with U.S. Supreme Court *Rule* 12, 28 U.S.C.

ARGUMENT

SUMMARY OF ARGUMENT

Point A

Respondent had the right to transfer her citizenship from Texas to Arkansas, notwithstanding she was a married woman, previously domiciled in Texas, since the undisputed testimony shows that she had sufficient provocation for leaving her former husband, if such be a necessary predicate to the exercise of the right to acquire a new domicile.

Point B

The Honorable Court of Appeals did not err in holding that the trial court made a mistake in dismissing Respondent's complaint. It did not err in holding that the Arkansas decree of divorce found that Respondent was domiciled in Arkansas at the time of its rendition, and that such decree was entitled to respect in the lower court. The law is well settled that such decree is entitled to full faith and credit, is a prima facie valid, and so presumptively correct as to be overthrown only by positive testimony impeaching the jurisdiction of the court.

Point C

The Honorable Court of Appeals did not commit error in deciding a jurisdictional fact contrary to the evidence, since the undisputed and uncontradicted evidence shows that with sufficient provocation the Respondent left Texas and made her home in Arkansas,

with the intention of remaining in such home for an indefinite period, thus becoming a bona fide resident of the latter state.

Point D

The Petition for Writ of Certiorari does not set out any valid or meritorious reason for the granting of such a writ in this case, there having been no questions of law incorrectly decided in the courts below, and the fact question having been correctly disposed of by the Court of Appeals.

ARGUMENT

Point A

Respondent had the right to transfer her citizenship from Texas to Arkansas, notwithstanding she was a married woman, previously domiciled in Texas, since the undisputed testimony shows that she had sufficient provocation for leaving her former husband, if such be a necessary predicate to the exercise of the right to acquire a new domicile.

Respondent understands Petitioner's First Question (Petition for Writ of Certiorari, 2) to assert error of the Court of Appeals in holding that Respondent was at liberty to transfer her citizenship from Texas to Arkansas. Omitting comment upon Petitioner's misleading and erroneous presentation of his First Question (Petition for Writ of Certiorari, 2-3), which will make itself obvious to the Court, Respondent submits that there is only one question in this case, which does not concern itself with the *right* of Respondent to ac-

quire a new domicile. The question involved is whether Respondent *did* acquire a new domicile in Arkansas prior to July 28, 1949, the date this suit was filed in the trial court. (R. 174.)

There can be before the court in this case only the one question above; there has been but the one question in the case since the Petitioner and his co-defendants below filed their Motion to dismiss the complaint. (R. 112, 119-127, 163-164, 174.)

Respondent submits that under the law she had a right to leave her former husband and acquire a domicile of choice for whatever reason seemed to her to be sufficient. The exact language of the Court of Appeals "We take it to be well established that plaintiff was at liberty to instantly transfer her citizenship from Texas to Arkansas and this she might do without necessity and simply from choice. She had a right to select her domicile for any reason that seemed sufficient to her." (R. 175) has abundant support in the authorities.

The idea that Respondent could not "abandon the (so-called) matrimonial domicile of herself and husband in Texas" (Petition for Writ of Certiorari, 6) and acquire a separate domicile for herself in Arkansas constitutes a "pure fiction." Such a legalistic notion is not the law, and the Court of Appeals correctly held that Respondent was free to choose her own domicile. *Williams vs. North Carolina*, 317 U.S. 277, 87, L. Ed. 285 at 287; and see *Peff vs. Peff*, 2 N. J. 513, 67 A (2) 161, 164. But this language is not necessary to the decision in this case, and even if such language be construed to be necessary to the decision in the case,

yet the findings of the Court of Appeals are that the Respondent had provocation for leaving her husband, which clearly gave her a right to acquire a new domicile, even under the ancient common law.

It is therefore respectfully submitted to the Court that there is no such question presented in this case as is suggested by the Petition for Writ of Certiorari, First Question Presented, (Petition for Writ of Certiorari, 2).

Point B

The Honorable Court of Appeals did not err in holding that the trial court made a mistake in dismissing Respondent's complaint. It did not err in holding that the Arkansas decree of divorce found that Respondent was domiciled in Arkansas at the time of its rendition, and that such decree was entitled to respect in the lower court. The law is well settled that such decree is entitled to full faith and credit, is a prima facie valid, and so presumptively correct as to be overthrown only by positive testimony impeaching the jurisdiction of the court.

The Court of Appeals in its opinion has stated that "In taking jurisdiction of this cause and rendering a decree for plaintiff, the Pulaski Chancery Court necessarily found that plaintiff was a *bona fide* resident of Arkansas and this finding should be accorded full respect, giving due regard for the fact under our Federalism the domestic relations of husband and wife were reserved to the States." (R. 176.) This holding is in consonance with reason and with the authorities herein cited. The Supreme Court of Arkansas, recognizing

the limitation of the power of courts of a state to decree divorces where no domicile in the state is present, says that "Before a person can become a resident of this state so as to have his marital status determined by the courts of this state, he must, in truth and in fact, be a bona fide resident of the state, as hereinafter defined." *Cassen vs. Cassen*, 201 S.W. 585. See also *Birnstill vs. Birnstill*, 234 S.W. (2) 757; *Swanson vs. Swanson*, 206 S.W. (2) 169; *Stimmel vs. Stimmel*, 235 S.W. (2) 959.

That the Arkansas court necessarily found Respondent to be domiciled in Arkansas is obvious. "The Arkansas decree of divorce obtained by the respondent husband, in an action in which the appellant wife was not served and in which she did not appear, was necessarily predicated upon a finding by the Arkansas Court that respondent was domiciled in that State . . ." *Rose vs. Rose*, 101 NYS. (2) 173. In the language of this Court, "The fact that the (Arkansas) court found that (Respondent) was domiciled there is entitled to respect, and more." *Williams vs. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577. And domicile of a plaintiff in a divorce action is recognized as essential "in order to give the court jurisdiction which will entitle the divorce decrees to extra-territorial effect at least when the defendant has neither been personally served nor entered an appearance. The findings made in the divorce decree(s) in the instant case must be treated on the issue before us as meeting those requirements for it seems clear that the provisions of the (Arkansas) statute, that plaintiff in this type of case must 'reside' in the State for the required period, requires

him to have a domicile as distinguished from a mere residence in the State." *Williams vs. North Carolina*, 317 U.S. 287, 87 L. Ed. 279 and 285.

There is no dispute as to Petitioner's right to question the jurisdiction of the Arkansas Court rendering the decree divorcing Respondent and Petitioner; that right cannot, as determined by this Court, be foreclosed, *Williams vs. North Carolina*, supra. But there is no merit in Petitioner's so-called Second Question presented, since there could be no error on the part of the Court of Appeals in holding that the Arkansas court necessarily found Respondent was a bona fide resident of Arkansas.

Point C

The Honorable Court of Appeals did not commit error in deciding a jurisdictional fact contrary to the evidence, since the undisputed and uncontradicted evidence shows that with sufficient provocation the Respondent left Texas and made her home in Arkansas, with the intention of remaining in such home for an indefinite period, thus becoming a bona fide resident of the latter state.

The Court of Appeals' review of the evidence in this case left that court with the definite and firm conviction that a mistake was made by the trial court in finding that Respondent was not domiciled in Arkansas on July 28, 1949. (R. 175.) That Court could find some evidence "from which an inference may be drawn to support the finding," but it was obvious to the reviewing court below that Respondent did "truly and actually" acquire a citizenship in Arkansas. (R. 176.)

Petitioner asserts, apparently, that the trial court could 'finally' determine the issue of fact as to Respondent's domicile in this case. (Petition for Writ of Certiorari, 5). Where the findings of fact of a trial court sitting without a jury, however, are "clearly erroneous," the findings may be set aside, as was done in this case. *Federal Rules of Civil Procedure, Rule* 52; *United States vs. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746; *H. F. Wilcox Oil & Gas Co., vs. Diffir*, 10 Cir. (1950) 186 F. (2) 683. There is, this Court has said, no conclusiveness to the findings of fact by a trial court; there never has been. *U.S. vs. U.S. Gypsum Co.*, supra. An appellate court is always at liberty to review the evidence for the purpose of determining whether the trial court's findings are clearly erroneous. *Federal Rules Civil Procedure, Rule* 52. The Court of Appeals having the right to review the facts and to set aside the finding of the trial court, was such action by the court correct — did the Court of Appeals err in this respect? In short, was the trial court's finding of lack of domicile "clearly erroneous?"

Obviously it was; the Court of Appeals had no hesitation, and minced no words concerning the matter. That court's opinion is brief; it did not require labored argument or detailing of facts for the court to give its opinion. There was no dissent.

Respondent here asserts that the decision of the Court of Appeals was eminently sound and correct, and could not have been otherwise, consideration being given to the undisputed and uncontradicted testimony of the respondent, *and the acts of Respondent entirely consistent with her declared intentions.*

It would be idle to review the evidence in this case in its entirety, and indeed this is unnecessary. It is sufficient, Respondent submits, to point out that the Respondent testified that she left Texas and her former husband because he had threatened her and she was afraid of him. (R. 87, 150.) And it is singularly apparent that not only did the petitioner fail to offer to disprove this testimony, but there was not even any attempt to cross examine Respondent concerning it. Further, and more important still, the declared intentions of Respondent to make her home in Arkansas are fully borne out by her acts, which have been and remain consistent with her declared intentions. After all, the intention of any person must be gathered from the declarations of the person, viewed in the light of the conduct which bears out or destroys the effect of the declarations. In this case, which is unlike most others in this respect, the Respondent has consistently shown by her conduct that her real intention in September, 1948, was to leave her Texas home and to establish it in Arkansas.

The Arkansas Court found that Respondent had grounds for divorce from Petitioner. This finding may not be attacked at this time. *Williams vs. North Carolina*, supra; *James vs. James*, 81 Texas 373, 16 S.W. 1086; *Milliken vs. Meyer*, 61 S. Ct. 339, 311 U.S. 457, 85 L. Ed. 278, 132 ALR 1357; rehearing denied, 61 S. Ct. 548, 312 U.S. 712, 85 L. Ed. 1143, Mandate conformed to, 111 P (2) 232, 107 Colo. 295; 50 *C.J.S.* p. 492, Sec. 891, and cases there cited. She had provocation for leaving Petitioner therefore, and certainly possessed reasons for desiring to change her domicile.

Given a reason for desiring to change the domicile, considering her declarations that she intended to live in Arkansas indefinitely, and comparing her avowed intentions with her actual conduct, no reasonable trier of fact could conclude that Respondent did not change her domicile.

The trial court, evidently giving effect to unproved allegations in the Motion to Dismiss complaint, and suggestions of Petitioner's counsel, based his finding upon surmise, suspicion, and speculation. There could be no other basis for such finding. But this is an insufficient basis, and "clearly erroneous." Such an unsupported finding could not have been allowed to stand, and the Court of Appeals has rendered the only judgment possible in the case.

It is, therefore, respectfully submitted that there are no questions in the case calling for a review by this Honorable Court. Certainly the three purported questions set out in the Petition for Writ of Certiorari are without merit, and are not presented in this case.

Point D

The Petition for Writ of Certiorari does not set out any valid or meritorious reason for the granting of such a writ in this case, there having been no questions of law incorrectly decided in the courts below, and the fact question having been correctly disposed of by the Court of Appeals.

The Petition for Writ of Certiorari apparently sets forth two reasons for the granting of the requested writ in this case (Page 10-11), but as has been shown here-

inabove (Respondent's Brief, pp. 10-18) there is no merit to such purported questions. Petitioner would have this Court believe that the Court of Appeals first decided a question of law erroneously (Petition for Writ of Certiorari, 10). However, no decision of law was announced in the opinion of the court below. (R. 173-176.) In any event the language of the court quoted on p. 10 of the Petition for Writ of Certiorari, which is to be found in the middle of p. 175 of the Record, is supported by the highest authority in the land. Counsel for Petitioners should, as those involved in the litigation in the case of *Whatley vs. Whatley*, (Ark. 1943) 170 S.W. (2) 600, concede that the language is absolutely correct. As the Court in the Whatley case states:

> "Counsel for appellant, with commendable frankness, concede that appellant's theory of defense on the ground that the residence of a wife is necessarily that of her husband has been upset by a recent decision of the Supreme Court of the United States. Williams vs. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. .....), and do not insist here that the lower court's ruling on appellant's motion to dismiss was erroneous. This court has frequently held that a wife may acquire a separate resident from that of her husband and may properly institute suit for divorce in the county of her separate residence. 'We are committed to the rule which is supported by the great weight of authority that a wife may acquire a separate domicile from that of her husband and at that domocile so acquired may institute proceedings against her husband for divorce. Wood vs. Wood, 54 Ark. 172, 15 S.W. 495; Wood vs.

Wood, 140 Ark. 361, 215 S.W. 681; McLaughlin vs. McLaughlin, 193 Ark. 207, 99 S.W. (2) 571, 572."

It should be no longer open for serious argument that a married woman can acquire a separate domicile from that of her husband, and this was the rule even before the first Williams case. In *Williamson vs. Osenton*, 232 U.S. 625, 34 S. Ct. 442, 58 L.Ed. 761, this court, speaking through Mr. Justice Holmes stated that "However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicile from that of her husband for purposes of divorce is not disputed and is not open to dispute . . . *This she may do* without necessity and *simply from choice, as the cases show*, and the change that is good as against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in *absolute terms*." (Citing cases.) The Court of Appeals cited this authority. (R. 175, fn. 1.)

This court again in the first *Williams* case refers to the absurdity of the notion that a wife's domicile follows that of her husband, calling it "pure fiction." This court further stated that as far as state power is concerned "no distinction between a matrimonial domicile and a domicil later acquired has been suggested or is apparent." And, the existence of the power of a state to alter the martial status of its domiciliaries is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders. The power

of the state of Arkansas to decree a divorce from Petitioner, the absent spouse, did not depend upon whether Respondent's departure from Texas was or was not justified. First *Williams* case. Thus, it is clearly apparent that the power of the Arkansas Court to render a decree divorcing Respondent and Petitioner was dependent upon only one single proposition: the domicile of Respondent in that State.

Should the language quoted in the Petition for Writ of Certiorari, second paragraph, page 10, be construed to be a holding of the Court of Appeals, then such holding is correct under the authorities. Particularly is this holding correct when consideration is given to the findings of the Court of Appeals that the Respondent had cause to leave her former husband and that since she had been threatened by him she did not want to remain in Texas. Certainly, even under the most ancient "fiction" of the common law, Respondent was entitled, and had a right to choose a domicile after her husband had given her a reason and a necessity therefor. *Curry vs. Curry*, Tex Civ. App. 1938, 122 S.W. (2) 677; *Michael vs. Michael, 34* Tex. Civ. App. 630, 79 S.W. 74; *Worden vs. Worden* (Tex. 1949), 224 S.W. (2) 187; *Oxley vs. Oxley*, 159 F. (2) 10. The case of *Cheever vs. Wilson* finally concludes the matter, for, in that case it is laid down as the law that

> "It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate

> domicile whenever it is nevessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. 2 Bishop on Marriage and Dov. 475. The proceeding for a divorce may be instituted where the wife has her domicil. The place of the marriage, of the offense, and the domicil of the husband are of no consequence. Ditson vs. Ditson, 4 R. I. 87." Cheever vs. Wilson, 76 U. S. 108, 9 Wall 108, 19 L. Ed. 604.

It can readily be seen, therefore, that the first Reason advanced by Petitioner for granting a writ in this cause is trivial, frivilous, and entirely lacking in substance.

As to the second reason advanced in the Petition for Writ of Certiorari (page 10-11), Respondent would point out to the Court two things:

(1) The Court of Appeals did not hold that a married woman may 'slip' out of a state for the sole purpose of obtaining a divorce, obtain the same by process by publication only, and present a decree in another state which is entitled to full credit by the so-called matrimonial state.

(2) The decision of the Court of Appeals does not mean, and cannot possibly be construed to mean that a state is precluded from attacking a foreign divorce decree because of lack of jurisdiction over the divorcing spouse.

With reference to (1) above, Respondent believes that the holding of the Court of Appeals is simply that the evidence in this case amply shows that Respondent acquired a domicile in Arkansas, and as a

citizen of that state was and is entitled to sue the Petitioner in Texas in a federal court. We call attention to the court's opinion where the issue of the case is plainly stated: "The sole question presented by this appeal is whether the plaintiff, Lyda M. Paudler, was a citizen of the State of Arkansas on July 28, 1949, when this suit was commenced." (R. 174). Whatever else the court may have said, its decision is quite clearly limited to the "sole question presented." The court says that "If plaintiff's new citizenship was really acquired, her right to sue in the Federal courts was a legitimate and legal consequence, not to be impeached by her motive for removal." (R. 175), and then says that "new citizenship was truly and actually acquired" by Respondent in Arkansas. (R. 176.) All other questions sought to be raised by Petitioner are outside the "sole question" presented below, and obviously need not be reviewed.

With further regard to (1) above, however, Respondent asserts that granting the Court of Appeals held as there stated, and assuming actual domicile was acquired, such holding would be correct under the principles of law laid down by this very Court itself. We would think in light of the *Williams* case, and others by this Honorable Court, that no contention would be made at this late hour that a divorce decree obtained by a spouse having an actual domicile in a state, wherein the absent spouse was constructively served and did not appear, is not entitled to full faith and credit under the Constitution, Article 4, Section 1. This Court's language in the case of *Estin vs. Estin.* 334 U.S. 541, 92 L. Ed. 1078, 68 S. Ct. 1213, 1 ALR

(2) 1412, makes this proposition so abundantly clear that we quote:

> "We held in Williams vs. North Carolina, 317 U.S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 ALR. 1273; 325 U.S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092, 157, ALR 1366, (1) that a divorce decree granted by a State to one of its domiciliaries is entitled to full faith and credit in a bigamy prosecution brought in another State, even though the other spouse was given notice of the divorce proceeding only through constructive service; . . ."

What ever Petitioner may assert to be the law at the present time, it is universally recognized, with perhaps the single exception for Petitioner, that this Court has determined that a state court, without personal service of process on the defendant, can "grant a divorce which is valid and entitled to faith and credit in all states." See Jackson, dissenting in *Rice vs. Rice*, 336 U.S. 647, 93 L. Ed. 957, at 960.

Further, in this particular case, the Petitioner had actual notice of the pendency of Respondent's suit for divorce. In addition to the Warning Order published four times in the Arkansas Gazette (R. 158, 159, offered R. 84), Petitioner received notice of the suit from the attorney ad litem, G. W. Shepherd. The authenticated copy of the divorce proceedings in the Record shows the letter written by Shepherd to Petitioner (R. 157, offered R. 84), and the answer of Shepherd states that he addressed a letter to Petitioner, and that "defendant has had actual notice of the filing of this action and a sufficient time to employ counsel and contest the same." (R. 156, offered R. 84). The

Decree of the Court (R. 160, offered R. 84), recites that "due service of process" by publication and of a warning order against said defendant, for the time and in the manner prescribed by law, has been made in this cause."

Although Petitioner lived in Crosbyton, Texas, a distance of less than forty miles from the place of the trial of this cause below, and although Petitioner could undoubtedly have appeared as a witness to a case where his property was involved, Petitioner did not appear for the trial, and did not testify. He was not sworn as a witness to deny any of the testimony of Respondent. He did not take the stand to deny that he had threatened and abused Respondent, and he did not offer to say that he had no actual notice of the pendency of the divorce suit. The record of the Arkansas proceeding and the Arkansas decree stand unimpeached; there is no evidence whatever in this case casting any doubt on the decree, and the Record in this case affirmatively shows that if Petitioner had desired to do so, he could have appeared to contest the divorce proceedings. Having had actual notice of those proceedings, he should not be allowed to contend that the Arkansas decree is not to be given full faith and credit.

Although it was within his power and to his interest to show that he did not have notice of the decree or that it was based upon insufficient process, Petitioner offered no testimony to refute the verity of the Arkansas decree. He did not attempt to introduce evidence, but remained silent, and his silence

"not only strengthens the probative force of the affirmative proof (of Respondent) but of itself is clothed with a certain probative force." *Sullivan vs. Fant*, Tex. Cir. App. 106 S.W. 612; *Pullman Palace Car Co. vs. Nelson*, Tex. Cir. App. 54 S.W. 624.

As to (2) above, we do not believe that any Court has yet held that a foreign judgment of divorce may not be inquired into for the purpose of determining the question of whether the divorcing spouse had actually acquired a domicile in the divorcing state. Certainly we credit the Court of Appeals with a knowledge of a law so universally recognized, and we cannot impute to the court below the intention of laying down a different rule of law. Nor can we read into the decision of the court such an intention. Perhaps the time will, and no doubt should, come, when such a rule of law will forever terminate the multitude of embarrassing and perplexing problems for litigants and courts; but in the present state of the law, we would suppose that a foreign divorce decree may be attacked on the ground that the court lacked jurisdiction of the spouse obtaining the divorce, and that this is a matter of more or less common knowledge.

The Court of Appeals having found that Respondent truly acquired a domicile in Arkansas, then it is evident that the divorce decree of that state is entitled to full faith and credit in the Federal District Court for the Northern District of Texas, Lubbock Division. We do not feel that a citation of the authorities in addition to those pointed out above is necessary to sustain this contention.

We therefore submit that the Petitioner has advanced no reason for the granting of a writ of certiorari in this case.

Respectfully submitted

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